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In the

Supreme Court of the United States

OCTOBER TERM, 1942

No.

G. B. HOWELL, ET AL, *Petitioners*

VS.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., ET AL *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, G. B. Howell, Mary T. Howell, J. V. Howell, Kiowa Drilling Company, Inc., Harry Fotiades, Mary Urania Fotiades, William P. Ford, pray for a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the 7th Circuit, entered May

2, 1942, (R. 2), affirming the decree of the United States District Court for the Eastern District of Illinois, entered August 20, 1941, (R. 224). Both respondents and petitioners, along with other defendants, took separate appeals from the judgment of the trial court on questions adversely affecting them. Respondents' appeal is No. 7811, and petitioners' No. 7812, in the Circuit Court of Appeals. A single record was used for both appeals, and a single opinion was written disposing of them, taking no separate cognizance of the respective appeals. While these petitioners are primarily seeking a writ of certiorari to review the judgment of the Circuit Court of Appeals in No. 7812, since it is difficult to ascertain what portion of the opinion is applicable to petitioners' appeal, and since only one record was taken to the Circuit Court of Appeals, we are also requesting review of the judgment in No. 7811, only insofar as it may be affected by the questions presented herein. A petition for rehearing was filed by these petitioners May 15, 1942, (R. 291), was entertained, and was denied on June 9, 1942, (R. 351), so that the petition is filed within the time prescribed by the Act of February 13, 1925, on which jurisdiction rests.

Statement of the Matter Involved

The issue in this case is as to whether, under the law of Illinois, there remained in respondents, holding under the deed hereinafter set out, any fee title to, or other property rights in, the oil and gas underlying the land described

therein after the year 1926, since both lower courts held that respondents' rights to use or occupy the surface of the land, for the purpose of exploring for and producing oil and gas, had terminated, because of respondents' breach of an express condition or limitation in the deed, upon compliance with which such rights depended.

The district court decreed that the respondent grantee, and its lessee, own the oil and gas under said land, and the sole and exclusive right to remove the same, but without entering upon or using the surface for that purpose; and then decreed that neither John P. Minier, the grantee in the deed, nor those claiming under him, has any right, title, or interest in the oil and gas under said land, and no right to mine or operate for the same, (R. 224). The Circuit Court affirmed the judgment of the district court, although erroneously stating that the latter's decision vested the oil and gas in the respondent grantee, without limitation or restriction, (R. op. last paragraph 287).

Thus, both courts decreed that, while respondents owned the oil and gas, neither respondents nor petitioners had the right to use the surface to operate for or produce the same. The result of these holdings is that neither party can use the surface to produce the oil and gas, but that one party owns it, nevertheless.

The material portions of the deed under construction, other than the description of the land and the acknowledgments, follow:

"The Grantors, John P. Minier and Rosa M. Minier, his wife, * * *, for and in consideration of the sum of ($6280) Sixty Two Hundred Eighty Dollars in hand paid, Convey and Warrant to Walter W. Williams * * *, all the coal, oil and gas underlying (describing the land).

* * * *

Together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by mining out the coal, oil or gas * * *. It is also covenanted and agreed that the Grantee herein, his heirs and assigns, shall have the right to take and use so much of the surface of said land as may be deemed necessary for the purpose of erecting, maintaining and operating, hoisting, air, pumping, and escape shafts, drains, ditches, and reservoirs, telephone and electric light and Power wires and the necessary roadways and railroad tracks to and from the same, with the right-of-way for any railroad necessary or required to carry said coal, oil and gas to market, but all the land the surface of which is so taken shall when occupied be paid for at the rate of One Hundred ($100.00) Dollars per acre.

It is understood that within two years after the Mine shaft intended to be used for the purpose of removing the coal from under the premises herein is completed all the surface privileges above set forth that the Grantee herein desires to exercise shall, either for Mine switches or for whatever purpose, be selected and paid for and the Grantor herein will execute a deed therefor, the surface privileges on the remainder of said land shall at the end of said two years be fully released and the right of the Grantee herein to take

any portion of the surface of the remainder of said lands is at an end.

* * * *

Dated this 16th day of March, A.D. 1914.

(Signed) John P. Minier (Seal)
(Signed) Rosa M. Minier (Seal)"

(R. 86-88).

At the trial, it was stipulated that the mine shaft referred to in the deed was completed in 1924; that no portion of the surface of the land had ever been selected, used, or paid for by the grantee, Walter W. Williams, or respondents who have succeeded to his title, nor have they ever obtained a deed for any portion of the surface subsequent to the quoted deed, (R. 109).

Respondent, Chicago, Wilmington & Franklin Coal Company, hereinafter called the Coal Company, obtained a deed from Walter W. Williams, conveying all his rights as grantee under the foregoing deed, dated February 4, 1918, (R. 89), which is substantially in the same form as the quoted deed.

On September 6, 1940, respondent Coal Company gave an oil and gas lease, reserving the usual royalty, to E. S. Adkins, (R. 93), which he assigned to respondent Shell Oil Company, hereinafter called Shell, (R. 102).

John P. Minier and wife, Rosa Minier, grantors in the quoted deed, claiming that all of the grantee's rights to oil and gas under the quoted deed had terminated, on January

17, 1941, gave an oil and gas lease on the land to William P. Ford and John H. Wall, (R. 124). On February 21, 1941, Minier and wife conveyed to said Ford and Wall "the sole and exclusive right to use the surface, for the purpose of mining and operating for oil and gas and all operations incident thereto" (R. 129). All rights under both these instruments by mesne assignments are now owned by petitioners. (R. 131, 133, 135, 137, 139, 141, 143, 145, 147).

Respondents as plaintiffs, instituted this suit on April 26, 1941, against petitioners as defendants (R. 2). John P. Minier and wife, Rosa M. Minier, and their children, Mary E. Minier, Robert V. Minier, and Willie Minier (to whom royalty interest had been deeded by John P. Minier and Rosa Minier), were also joined as defendants (R. 2), but after the decision of the Circuit Court of Appeals, they made some character of settlement without the consent of petitioners, and the terms of which are unknown to petitioners, and do not join in this petition for certiorari.

Prior to the filing of this suit by respondents, petitioners had commenced the drilling of an oil well on the land (R. 7). Without notice or hearing, upon respondents' petition, the trial court restrained petitioners from continuing to drill said well, and by the same order, restrained petitioners from interfering with respondents in the exercise of their claimed right to drill upon the land, thereby permitting respondents to commence drilling upon the land.

Thereafter, to protect the property from "irreparable damage" which would result from adverse drainage by wells on adjoining lands, a stipulation (R. 56) was signed by all parties. Under this, respondent Shell has drilled four oil wells on the West Half and petitioners G. B. Howell, et al, have drilled five wells on the East Half of the land involved. These wells have been operated, by the parties who drilled them, down to this day (R. 269). All costs of drilling and operating these wells, under terms of the stipulation, have been repaid to the parties who expended them out of the proceeds of oil produced from the property, except as to the costs of drilling the first well on the East Half and the first well on the West Half. The stipulation provides for reimbursement to the respective parties for the drilling of these two wells only to the extent of $5,000 each; the balance of the costs of drilling and equipping each of said wells (about $8,000) has been withheld and is to be repaid to the losing party only if the court holds that he is legally entitled to the value of this improvement (R. 58). These wells were drilled and have been operated, according to the stipulation, "without in any manner whatsoever waiving any of their respective rights and claims as to the merits of the controversy" (R. 57).

The proceeds of oil from all the wells, over and above the development and operation expenses which have been repaid to the extent above set forth, is several hundred thousands of dollars, which will be affected by the final decision of the case, as well as the value of the oil and gas rights governing future production.

Rulings of the Court Below

The Circuit Court affirmed the judgment of the District Court. In doing so, it held that the two-year clause for the termination of "all" surface rights applied to operations for oil and gas, and that under the limitation in the deed, the respondents had lost the right to occupy or use any part of the surface of the land for the purpose of exploring and producing oil and gas (R. 286). Nevertheless, it held that respondents continued to own the oil and gas in fee under this land, and affirmed the judgment of the trial court, decreeing that petitioners had "no right, title, or interest in or to the oil or gas underlying said real estate and have no right to mine or operate for oil or gas in or on said real estate" (R. 225), and permanently enjoining petitioners from "drilling, mining, or operating for the purpose of producing or attempting to produce the oil or gas" under said land (R. 226).

Jurisdictional Statement

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, ch. 229 (43 Stat. 938) 28 U.S.C.A., Section 347(a).

The judgment of the Circuit Court of Appeals was entered May 2, 1942, (R. 288); petition for rehearing was denied June 9, 1942, (R. 351).

A copy of the opinion of the Circuit Court of Appeals delivered by it upon rendering the judgment sought to be reviewed is appended hereto.

Questions Presented

1. The rights of the grantee in said deed, and his successors in title (respondents) to occupy or use the surface of the land to explore for oil and gas terminated in 1926, under the limitations in the deed, and the question here is whether after the termination of such rights, respondents continued to own the fee title, or any other right to the oil and gas under said land, or whether, after such termination, such rights were owned by the surface owner, from whom the petitioners hold an oil and gas lease.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals that respondents continued to own the fee title to the oil and gas, and were entitled to restrain petitioners even after they lost their right to use the surface to operate for and produce them, is in conflict with the following decisions of the Supreme Court of Illinois.

(a) Bruner vs. Hicks, 230 Ill. 536, 542, 82 N.E. 888—holding that no title is vested by a conveyance of oil and gas, except the "right to occupy the premises" for the purpose of producing them.

(b) Poe vs. Ulrey, 233 Ill. 56, 61, 84 N.E. 406—holding that a freehold estate of homestead was involved

"not because the lease of oil and gas was a conveyance of an interest in the homestead, but because of the rights granted in the surface".

(c) Gillespie vs. Fulton Oil and Gas Company, 239 Ill. 326, 331—holding that an oil and gas lease conveyed "merely the right to go upon the premises and explore for oil and gas and if found, to produce them".

(d) Updike vs. Smith, 378 Ill. 600, 604—holding the right to enter land for the purpose of prospecting and producing is a freehold.

(e) Transcontinental Oil Company vs. Emerson, 298 Ill. 394, 131 N.E. 645—holding that oil and gas are not susceptible of ownership, apart from the soil; that the only right which may be conveyed is the right to enter upon the land for the purpose of prospecting and operating for oil and gas, "which is a corporeal freehold interest".

(f) Watford Oil & Gas Company vs. Shipman, 233 Ill. 9, 84 N.E. 53, 54, and Carter Oil Company vs. Liggett, 371 Ill. 482, 21 N.E. (2d) 569, both holding that a grant or lease of oil and gas conveys nothing in the land which can be a subject of ejectment or a real action, but conveys only the right to occupy and use the land for the exploration of and production of oil, if found.

(g) Trigger vs. Carter Oil Company, 372 Ill. 182, 23 N.E. (2d) 55, 56—holding "no title vests in the grantee until it is actually removed from the land".

2. The decision of the Circuit Court of Appeals, to the effect that the respondents continued to own the fee title to the oil and gas, even after the termination of their right to use the surface to operate for and produce them, is in

conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Butler vs. McGorrisk*, 114 Fed. 300.

In the latter case, a deed conveyed "all the coal and the right to mine and remove the same", but provided that the grantee was "to mine and remove the same by May 1, 1891, and no coal is to be mined after that date". The court held that the grant of coal was so "indissolubly linked" with the right to mine it, that a limitation on the right to mine, when it expired, also terminated the grant of coal.

3. The right to use the surface of the land to operate for and produce oil and gas was the real beneficial grant which was fully effective at the time the deed was given and for a reasonable time thereafter. When respondents failed to exercise their right of selecting and paying for such part of the surface as they needed for their operations within the time limit, and their right to use the surface terminated, it should be held that their right to produce oil and gas also terminated and that it reverted to the grantor, because:

(a) Respondents are then denied the only practical means of producing oil and gas and of enjoying that mineral right.

(b) It is against public policy that an estate in land should be allowed to continue after a limitation provision has become operative causing the termination of all practical means for its enjoyment.

(c) The decision of the Circuit Court created an unreasonable division of the incidents of ownership, giving to each party no greater right than to prevent the other from using and enjoying the oil and gas, thus

resulting in a withdrawal of this vital natural resource from the channels of trade and denying its benefits to the public.

(d) By this anomalous decision (so designated by the trial court), the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this court's power of supervision.

WHEREFORE, petitioners pray that a writ of certiorari issue in this cause to the end that it may be reviewed and that part of the judgment below be reversed, which holds (1) that respondents continued to own oil and gas in fee after the termination of their right to use the surface of the land to produce them, and (2), which holds that respondents are entitled to an injunction preventing petitioners from drilling for oil and gas on the land.

Respectfully submitted

G. B. HOWELL, MARY T. HOWELL, J. V. HOWELL, KIOWA DRILLING COMPANY, INC., HARRY FOTIADES, MARY URANIA FOTIADES, WILLIAM P. FORD,

Petitioners.

By: W. F. WEEKS
RUSSELL SURLES
CHAS. F. POTTER
FRANK BEZONI
All of Tyler, Texas
Their Attorneys.

APPENDIX

In The

United States Circuit Court of Appeals

For the Seventh Circuit

Nos. 7811, 7812. October Term, 1941—April Session, 1942

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, a corporation, and SHELL OIL COMPANY, INCORPORATED, a corporation,
Plaintiffs-Appellants,
vs.
JOHN P. MINIER, et al.,
Defendants-Appellees.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, a corporation, and SHELL OIL COMPANY, INCORPORATED, a corporation,
Plaintiffs-Appellees,
vs.
JOHN P. MINIER, et al.,
Defendants-Appellants.

Appeals from the District Court of the United States for the Eastern District of Illinois.

May 2, 1942

Before Evans, Sparks and Kerner, Circuit Judges.

Kerner, Circuit Judge. These appeals involve a controversy over the right to produce oil from a tract of land in Franklin County, Illinois. These issues are the proper

construction of a deed of conveyance and the determination of the oil interests created.

The complaint affirmatively shows the existence of diversity of citizenship and the requisite jurisdictional amount. Essentially it seeks an adjudication that the right to the oil is in the plaintiffs.

On March 16, 1914, the deed in question was executed. (Its material portions appear in the margin.[1]) The grantor was John P. Minier, a farmer, who has lived upon the land

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1. The Grantor, John P. Minier and Rosa M. Minier, his wife, * * *, for and in consideration of the sum of ($6280) Sixty Two Hundred Eighty Dollars, in hand paid, Convey and Warrant to Walter W. Williams * * *, all the coal, oil and gas underlaying (describing the land).

* * * * * *

Together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by mining out the coal, oil or gas * * *. It is also covenanted and agreed that the Grantee herein, his heirs and assigns, shall have the right to take and use so much of the surface of said land as may be deemed necessary for the purpose of erecting, maintaining and operating, hoisting, air, pumping and escape shafts, drains, ditches and reservoirs, telephone and electric light and Power wires and the necessary roadways and railroad tracks to and from the same, with the right-of-way for any railroad necessary or required to carry said coal, oil and gas to market, but all the land the surface of which is so taken shall when occupied be paid for at the rate of One Hundred ($100.00) Dollars per acre.

It is understood that within two years after the Mine shaft intended to be used for the purpose of removing the coal from under the premises herein is completed all the surface privileges above set forth that the Grantee herein desires to exercise shall, either for Mine switches or for whatever purpose, be selected and paid for and the Grantor herein will execute a deed therefor, the surface privileges on the remainder of said land shall at the end of said two years be fully released and the right of the Grantee herein to take any portion of the surface of the remainder of said lands is at an end.

* * * * * *

Dated this 16th day of March, A. D. 1914.

(Signed) John P. Minier (Seal)
(Signed) Rosa M. Minier (Seal)

with his family and continually cultivated it from before 1914 to the present date. His grantee was Walter W. Williams, a practicing attorney, and it was Williams who drew this deed which Minier executed.

In 1918 Williams conveyed all the coal, oil and gas underlying the land to the Chicago, Wilmington & Franklin Coal Company, one of the plaintiffs, and from 1919 to 1928 inclusive the Coal Company paid the taxes separately assessed against the minerals underlying the land. On September 6, 1940, that Company executed an oil and gas lease to one Adkins who, in October 1940, assigned the lease to the Shell Oil Company, the other plaintiff.

In September, 1924, the shaft used for the purpose of removing the coal from under the premises was completed, but no portion of the surface of land was selected and paid for by Williams or the Coal Company.

After a hearing, the District Court made special findings of fact, stated its conclusins of law thereon, and entered a decree. Its decision was that the deed of conveyance vested in the plaintiffs, without limitation or restriction, all of Minier's interest in the coal, oil, and gas underlying the land and that the defendants were without interest in the minerals and had no right to produce them. But it was further ordered that in September, 1926, two years after the shaft was sunk, the plaintiffs had forfeited and lost all their rights to use the surface in drilling for and producing oil. 40 F. S. 316. To reverse this decree both plaintiffs and defendants have appealed.

The initial problem is whether the provisions in the deed, requiring surface rights to be exercised and paid for within the time provided, are applicable to the right to use the surface for the production of oil and gas upon the land.

Our task in construing the covenant is to effect, if possible, the intention of the parties. *Brenneman v. Dillon*, 296 Ill. 140, 147; *Texas Co. v. O'Meara*, 377 Ill. 144, 150, "We must consider the circumstances and so far as possible place ourselves in the situations of the parties * * *. We must consider the objects which they wished to attain and the objects which they had in mind, as shown by the deed, as well as those which they did not have in mind and could not attain." *Texas Co. v. O'Meara, supra*, 151; *Kuecken v. Voltz*, 110 Ill. 264; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42.

The District Court held that the controversial covenant was a limitation upon the grantee's right to use the surface of the land in removing the underlying oil and gas. We appreciate the force in the contrary analysis of the plaintiffs, but believe the interpretation reached below to be the more persuasive. It must be remembered that to the grantor the value of the surface was as farm land. When he conveyed his rights to the gas, oil and coal, Minier did not part with the soil which gave him his livelihood. There is no doubt that the purpose of the covenant was to prevent the agricultural surface from being swallowed up by surface activities equally as incident to the removal of oil and gas as of coal; the value of the land for agricultural

use was not to be taken from the farmer grantor without the payment of added compensation. Perhaps there are infirmities in the covenant which, when viewed in isolation and not in regard to whole, seem inconsistent with the accepted interpretation, but that is so in most cases of construction. And even if we were of the opinion that under all the circumstances the opposing interpretations were equally sound, the result would be no different, for the grantee drew the deed and any ambiguities would be resolved against him. *McClenathan v. Davis*, 243 Ill. 87, 91 and *McConnaughy v. Gage*, 252 Ill. App. 17, 22.

To be sure, ordinarily the conveyance of the interest in coal, oil and gas would carry with it the implied right to enter upon the grantor's land and to use so much of it as necessary for the full enjoyment and benefit of the property granted.*Threlkeld v. Inglett*, 289 Ill. 90. But clearly that right may not be implied, when the parties by their agreement have limited the surface privileges.

There remains the ultimate question of whether the plaintiffs have any property interest in the oil and gas underlying the land in which they no longer have surface rights.

The law of Illinois is settled that oil and gas in place are minerals, but because of their fugacious qualities can not be the subject of an absolute ownership. These minerals belong to the owner of the land only so long as they remain under it and if he makes a grant of them to another, it is only a grant of such oil and gas as the grantee may find

and take from the earth. No title to these minerals as such vests until they are reduced to possession. *Watford Oil Co. v. Shipman*, 233 Ill. 9, 12; *Poe v. Ulrey*, 233 Ill. 56, 62; *Ohio Oil Co. v. Daughtee*, 240 Ill. 361, 367; *Triger v. Carter Oil Co.*, 372 Ill. 182, 185; *Updike v. Smith*, 378 Ill. 600, 604, and the right to them will not support ejectment or any other real action. *Watford Oil Co. v. Shipman, supra; Carter Oil Co. v. Liggett*, 371 Ill. 482.

Such is the law, whether the oil and gas themselves are conveyed, cf. *Poe v. Ulrey, supra*, or the grant is to enter and prospect for them, cf. *Brunner v. Hicks*, 230 Ill. 536. Yet, it is of little practical moment that there can be no absolute ownership of oil and gas in place. In the courts, rights in oil and gas are nevertheless recognized and their incidents are no less real because Illinois does not accept the concept of absolute ownership. For example:

Sections 6 and 7 of the Mines Act[2] provide that a mining right may be conveyed by deed or lease, and when that is done, a separate taxable estate is created. Oil and gas leases are governed by the statute and are accordingly taxed. *People v. Bell*, 237 Ill. 332. Likewise, leases are considered corporeal property for the purposes of the state franchise tax and a lessee corporation must include their value in the total amount of its tangible property. *Transcontinental Oil Co. v. Emerson*, 298 Ill. 394.

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2. Ill. Rev. Stat. 1941, chap. 94, Sec. 6, 7,

When a right is granted in an oil and gas lease to enter upon the land for the purpose of prospecting for oil and gas, and removing them by means of structures, pipes, etc., constructed upon the surface, a freehold estate in the land itself is created, if the rights are of indefinite duration. *Brunner v. Hicks, supra,* 542; *Watford Oil Co. v. Shipman, supra; Trigger v. Carter Oil Co., supra.* But it does not work a severance, for as long as title to the surface and any part of the oil and gas beneath it remain in the same owner, there will not be a complete severance of oil and gas from surface rights. Accordingly, there is not a severance even when the individual surface owner's rights in the oil and gas are only an undivided interest. *Updike v. Smith, supra.*

Of course the severance of the oil and gas from the surface rights is recognized. A land owner may create a separate estate by deed, *Trigger v. Carter Oil, supra,* or by a grant of the "surface only" to a third party, which conveyance reserves in the grantor the right to the oil and gas beneath the surface. *Shell Oil Co. v. Manley,* 124 F. 2d. 714. And a testator whose land is covered by one lease may devise separate tracts of land, except the underlying oil, and devise rights in it to all the named devisees as tenants in common. *Connover v. Parker,* 305 Ill. 292.

These recognitions of property in oil and gas determine the rights of the individuals in the fugitive minerals underlying the land; they fix what one individual may do and what another one may not. It is for these incidents that

partiest bargain, not for titular "absolute ownership" of the oil and gas in place.

In our case, it is clear that Minier conveyed to Williams, without limitation or restriction, all of his rights in the oil and gas beneath the land. The granted right was in fee and it was not forfeited when the grantee lost all of his rights to the surface. He is entitled to this interest against the owner of the surface, as well as against strangers to the tract. Accordingly the judgment of the lower court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

In the

Supreme Court of the United States

OCTOBER TERM, 1942

No.

G. B. HOWELL, ET AL, *Petitioners*

VS.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Opinions Below

The opinion of United States District Judge, Walter E. Lindley, appears at record, page 207, and is reported in 40 F. S. 316.

The opinion of the Circuit Court of Appeals, written by Circuit Judge Kerner appears at Record, page 283, and is reported in 127 F. (2d) 1006.

Jurisdictional Statement

Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, ch. 229 (43 Stat. 938) 28 U.S.C.A., Section 347(a).

Statement of the Case

To avoid repetition, we refer to the STATEMENT OF THE MATTER INVOLVED, as contained in the preceding Petition for Writ of Certiorari, page 2.

Specifications of Errors

1. The rights of respondents, and their predecessors in title, to occupy and use the surface of the land for the exploration for and production of oil and gas had terminated under the limitations in the deed, and therefore, the Circuit Court of Appeals erred in holding that the granted right to the oil and gas was in fee and was not terminated when the grantee lost all his rights to use or occupy the surface for the purpose of exploring for and producing the oil and gas.

2. Respondents' rights to use and occupy the surface for operations for and production of oil and gas having terminated in 1926, by virtue of the limitation in the deed, the Circuit Court of Appeals erred in holding that an oil and gas lease executed to petitioners by the grantors (J. P. Minier, et al) in the deed, did not vest said lessee with the

right to use and occupy the surface of the land for the purpose of operating for and producing oil and gas therefrom, and with the title to the oil and gas when produced.

Argument Under Specifications of Error 1 and 2

The decision of the Circuit Court of Appeals is in conflict with the rule of decision in Illinois that no greater right in oil and gas can be either owned or conveyed than the right to use the land to drill and operate therefor, and after production become the owner, because it adjudicates that respondents own the oil and gas in fee although they have lost their right to operate and drill upon the land to produce it.

The decision of both the District Court and the Circuit Court of Appeals that the rights of the grantee under said deed and of respondents as his successors, to use the surface of the land for the purpose of operating for and producing oil and gas terminated in 1926, two years after the mine shaft referred to in the deed had been completed, is correct and is not here questioned. An analysis of the language of the deed and the purpose to be accomplished by the two-year clause removes any possibility of questioning that part of the decision of the Circuit Court.

Although respondents are denied the right to use the land for the purpose of operating for oil and gas and will be required to cease operations and plug the nine wells located upon the land (R. 226), nevertheless that court holds that:

> "In our case it is clear that Minier conveyed to Williams, without limitation or restriction, all of his rights in the oil and gas beneath the land. The granted right was in fee and it was not forfeited when the grantee lost all of his rights to the surface. He is entitled to this interest against the owner of the surface * * * ".

The quoted language from the court's opinion is not the law as declared in the Illinois decisions concerning the ownership of oil and gas. In fact, the Illinois cases cited by the Circuit Court of Appeals in its opinion reach a conclusion directly contrary to that announced by that Court in the foregoing quotation.

The Court recognized that the Supreme Court of Illinois has held in the following cases that oil and gas in place are not subject to absolute ownership and that no title vests until they are reduced to possession: *Watford Oil Company vs. Shipman*, 233 Ill. 9, 12; *Poe vs. Ulrey*, 233 Ill. 56, 62; *Ohio Oil Company vs. Daughtee*, 240 Ill. 361, 367; *Trigger vs. Carter Oil Company*, 372 Ill. 182, 185; *Updike vs. Smith*, 378 Ill. 600, 604; *Carter Oil Company vs. Liggett*, 371 Ill. 482; *Bruner v. Hicks*, 230 Ill. 536.

The substance of these cases is that the grantee of oil and gas, who is given the right to use the land for its production, has a freehold estate in the land itself, not because he owns the oil and gas, but because he has the right to use the land for its production. This same reason was used in *Transcontinental Oil Company vs. Emerson*, 298 Ill. 394, where it was held that an oil and gas lessee had a corporeal

freehold estate. The court in the latter case said (Page 648):

> "* * *The fugacious nature of oil and gas * * * renders them not susceptible of ownership distinct from the soil,* * *".
>
> (P. 649).
>
> "They belong to the owner of the land only so long as they remain under the land, and his grant of them to another is a grant only of such oil and gas as the grantee may find, and no title to it vests in the grantee until it is actually found. The conveyance, however, of the right to enter upon the land for the purpose of speculating and operating for oil and gas, laying pipe lines * * is a conveyance of an interest in the land itself, which, if of indefinite duration, is a freehold estate in the land."

A summary of these decisions, declaring the law of Illinois, discloses that the actual interest of a grantee of oil and gas is not "ownership" of these minerals, but rather is a grant of the right to the use of the surface of the land for the purpose of exploring for and producing oil and gas, which is the same rule recognized in California, Oklahoma, and several other states, frequently referred to as the "Non-Ownership Rule". We quote briefly from the case of *Richfield Oil Company vs. Hercules Gasoline Company*, California, 297 Pac. 73, 75, where the court says:

> "* * * there can be no grant or conveyance of oil or gas in place separate and apart from the right to go upon the premises and extract them."

Thus it is clear that in Illinois the respondents cannot own the oil and gas separate and apart from the right to go upon the premises and extract them. Since this is true, when, by the express limitation in the deed, the respondents lost the right to go upon the premises and extract them, necessary no title in the oil and gas, fee, or otherwise, remained in them.

The very essence of the oil and gas right, the thing which is the subject of ownership or conveyance under the Illinois law (as well as the other "non-ownership" states), is the right to conduct operations on the land for the production of oil and gas. Thus in *Bruner vs. Hicks*, 230 Ill. 536, 542, the court said:

> "It may be conceded that the title to the oil and gas in said lands did not vest in the appellants, as assignees of the said lease, until the oil and gas were discovered and appropriated by them; still the right to occupy the premises for the purposes aforesaid, conferred * * * * a present vested right in said premises."

In *Poe vs. Ulrey*, 233 Ill. 56, 61, 62, the court said:

> "The freehold estate of homestead was involved in the Circuit Court under the pleadings, not because the lease of oil and gas was a conveyance of an interest in the homestead, but because of the rights granted in the surface."

And in *Gillespie vs. Fulton Oil & Gas Company*, 239 Ill. 326, 331, the court held:

> "The complainant had no right to the premises nor even to the oil and gas under them. What he acquired

> by the lease was merely the right to go upon the premises and explore for oil and gas, and, if found, to produce them according to the terms of the lease (Watford Oil and Gas Company vs. Shipman, 233 Ill. 9)."

Thus, it seems that when respondents are denied the right to use the land for the purpose of producing oil and gas, they are deprived of the very essence of what has been held to be their only right, and that nothing remains which has ever been recognized by the Illinois Courts as an interest or estate in oil and gas.

In *Mills & Willingham, Law of Oil and Gas* (1926 Edition) Section 19, Page 29, it is expressed in this language:

> "It would seem, therefore, that a denial to the owner of the mineral right, by the owner of the land, of the use of the surface for the purpose of exploring for oil and gas is a denial of the incorporated right itself, and would constitute an adverse possession under the statute of limitation."

In *9 University of Chicago, Law Review 345*, is is a comment upon the decision of the Circuit Court of Appeals in the case at bar. After reviewing the Illinois decisions, it concludes that "both the right, express or implied, to use the surface and the right to take the oil and gas must be present in order to sustain a lease or grant of these minerals."

The fallacy of the conclusion reached by the Circuit Court of Appeals is demonstrated by the following quotation from its opinion, supported by an Illinois decision:

> "To be sure, ordinarily the conveyance of the interest in coal, oil and gas would carry with it the implied right to enter upon the grantor's land and to use so much of it as necessary for the full enjoyment and benefit of the property granted. Threlkeld v. Inglett, 289 Ill. 90. But clearly that right may not be implied, when the parties by their agreement have limited the surface privileges."

Thus, the court holds that an ordinary conveyance of the interest in the oil and gas would carry with it the implied right to enter upon the land and use so much of the surface as was necessary for the full enjoyment of the property conveyed, but nevertheless, it holds that such right to use the surface will not be implied when the parties have limited the use of the surface privileges to a specified time, or to the happening of a contingency. But the court failed to apply the law of Illinois in construing the latter type of instrument. Under the law of Illinois, when the right to use the surface for operating and producing oil and gas terminated by express limitations in the grant of such minerals, any fee or other title or right to the oil and gas likewise terminated.

The Court should not uphold respondents title to oil and gas after expiration of their right to use the surface to obtain them: Since all practical means of producing, using, and enjoying the oil and gas have terminated, a condition should be implied terminating their oil and gas rights.

The rule just stated is applicable in states which recognize the oil and gas "ownership rule", and even where hard minerals, as coal, are involved, since it is a rule of reason.

The trial court recognized in its opinion (R. 212), that its decision created an "anomalous" situation because neither of the parties to the controversy had the means for practical enjoyment of the oil and gas rights, but on the contrary, each only had enough rights to prevent the other from enjoying them.

In the opinion of the Circuit Court of Appeals (R. 287), the court indicated an intention to disregard the fictitious theory of the ownership and non-ownership surrounding the title to oil and gas, in these words:

> "These recognitions of property in oil and gas determine the rights of the individuals in the fugacious minerals underlying the land; they state what one individual may do and what another may not. It is for these incidents that parties bargain, not for titular 'absolute ownership', of the oil and gas in place." (Emphasis ours).

By this language, the court clearly holds that the right to oil and gas follows the person having the right to do the things necessary to operate for and produce it. These rights are the "incidents" for which the parties bargain, not an empty title to the oil and gas with no right to enjoyment thereof by operation and production.

But in concluding its opinion, the court entirely ignored its sound reasoning quoted above, when it said:

> "The granted right was in fee and it was not forfeited when the grantee lost all of his rights to the surface. He is entitled to this interest against the owner of the surface, as well as against strangers, to the tract."

By this language, the court reverts back to recognition of a barren, useless title in fee which serves respondents only to the extent that they can prevent petitioners from producing the oil; and, of course, at the same time, petitioners can prevent respondents from operating for and producing the oil.

It was suggested by the trial court (R. 212) that directional drilling might be considered as a means whereby respondents could obtain the oil, although there was no evidence to this effect offered in the trial of the case. On the contrary, the court is entitled to take judicial knowledge from periodicals recognized by the oil industry, that controlled directional drilling was unknown until 1930, when it was first used at the Huntington Beach Field. "Underground Well Surveying, Directed Drilling, Side Wall, Sample and Polar Core Orientation" by G. L. Kotheny, Page No. 866-12E, American Petroleum Institute, published April 18, 1941; *Rhomberg vs. Texas Company*, (Ill. Sup.) 40 N.E. (2d) 526; *Summers Oil and Gas* (Permanent Edition, 1938) Vol. 1, Paragraph 26, Page 65; "Controlled Directional Drilling" by J. C. Albright, published by The Petroleum Engineer, January 1935, Page 21; "Theory and Practice of Directed Drilling" by R. E. Allen, Assistant Oil Umpire of California, published by Petroleum Development

and Technology, 1934, Page 34; Petroleum Investigation—Hearings before a Subcommittee on Interstate and Foreign Commerce, House of Representatives—73rd Congress, H. Res. 441, September 17-22, 1934.

That the court may take judicial notice from such publications is held in *T. & P. Railroad vs. Pottorff*, 291 U.S. 245, 254, 78 L. Ed. 777, 782.

The condition or limitation on respondents' right to operate on the land for oil and gas became operative in 1926, and if our argument is correct, their oil and gas rights terminated at that time. The subsequent discovery of directional drilling cannot rejuvenate their estate. The fact that the controversy did not reach the courts until 1941, cannot be ground for a different decision than would have been reached had the trial taken place in 1926.

Certainly, directional drilling was unknown in 1914, when the deed was delivered, and it is the intention of the parties and the circumstances surrounding them at that time which must be considered in construing this deed; it is the means of production then known and contemplated by the parties which must determine whether they intended that the grantee's oil and gas rights should endure beyond his right to produce them.

It is our contention that because the limitation, regardless of the non-ownership theory of oil and gas which applies in Illinois, and even if hard minerals were involved, after it became effective, expressly terminated all respon-

dents' rights to use the surface of the land to operate for oil and gas, and because this deprived respondents of all **practical** means of producing oil and gas, that a condition must be **implied** terminating all respondents' oil and gas rights.

In *Benedum-Tree Oil Company vs. Davis* (Ohio CCA) 107 F. (2d), 981, certiorari denied, 310 U.S. 634, the court says:

> "An implied condition may be inseparably annexed to a grant from its essence and constitution, although no condition is expressed in words."

Accord: *Logan Natural Gas & Fuel Company vs. Great Southern Oil & Gas Company*, 126 F. 623.

In *Butler v. McGorrisk*, 114 Fed. 300, Butler sued McGorrisk, and others, to recover the value of coal mined after May 1, 1891, from under certain land in which all of the coal had theretofore been conveyed to Butler. The deed conveyed "all the coal and the right to mine and remove the same" in the land, but provided, further, that the grantee was "to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date."

After holding that the deed was unambiguous, and that the plaintiff, Butler, was not entitled to recover from the defendants, the court gave its reasons therefor in the following language (P. 302):

> "The right to the coal and the right to mine it are by the terms of the deed indissolubly linked together, and expired together * * * the right to mine and re-

move coal is the very substance of this contract. A limitation upon that right is necessarily a limitation upon the coal conveyed, and the coal conveyed is of no use or utility without the right to mine and remove, and there can be no implied right to mine and remove the coal where the right is expressed and the limitation is expressly put upon the right."

To the same effect are cases construing deeds of standing timber, which limit the time for removal. It is held in those cases that to relieve from "irrational consequences", the time limit on the right of removal must be construed as limiting title to the timber. *Weber vs. Proctor*, 89 Me. 404, 36 Atl. 631; *38 C. J.* 163, 164; *15 ALR* 70, 75, 78—Annotation; *Supplemental Annotations, 31 ALR* 944-954; *42 ALR* 644.

Conditions have been implied in various jurisdictions to enforce implied covenants in oil and gas leases requiring development with due diligence and the drilling of offset wells to prevent drainage. *Pelham Petroleum Company vs. North*, 78 Okla. 39, 188 Pac. 1069; *Sauder vs. Mid-Continent Petroleum Company* (Kan.) 292 U.S. 272, 78 L. Ed. 1255; *Mansfield Gas Company vs. Alexander*, 97 Ark. 167, 133 S.W. 837.

There can be no question but that in the case at bar, the drilling of each of the wells upon the land in controversy was absolutely necessary to recover the oil and to prevent waste. The stipulation under which the wells were drilled "without in any manner whatsoever waiving any of the respective rights and claims as to the merits of the con-

troversy" provided that "all of the parties to this cause agree that **irreparable damage** will ensue unless a further order of the court is entered permitting additional drilling upon the above-described premises * * *" (Emphasis ours) (R. 56, 57). The stipulation provided for eight wells on the eighty acres, or one well to each ten acres (R. 57, 58). The ninth well was necessary to prevent drainage.

The parties themselves have construed the deed as contemplating development for oil and gas only by drilling directly upon the surface of the land.

This suit was instituted by respondents asserting as their only right, the right to drill directly upon the land to produce the oil and gas underlying it. In their complaint (R. 2), they did not allege and did not claim the right to produce the oil by any means other than drilling directly upon the land, and they actually started their first well directly upon the land after a preliminary restraining order had been entered by the trial court (without notice to petitioners) restraining petitioners from interfering with them in the drilling of such well (R. 31). This was before the stipulation.

No evidence was offered by respondents showing that they could obtain the oil and gas by any means other than drilling directly upon the land. This possibility was advanced for the first time by the District Judge in his opinion (R. 207, 212).

It does not even appear that respondents have any adjoining land which could be used by them for the purpose suggested by the trial court.

This case was plead and tried by all the parties upon the basis that the only practical way of producing the oil was by drilling upon the land itself, and it is upon this basis that the case should be decided. This evidences a construction of the deed by the parties themselves that the only means of operating for and producing oil and gas contemplated by the parties to the deed was by operations directly upon the surface. This should be entitled to great weight in the eyes of the court.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors herein pointed out may be corrected; that the decisions of the United States Court should be conformed to the decisions of the State Courts announcing the local law involved; that the decision of the Circuit Court in this case should be conformed to the decision of the Eighth Circuit Court of Appeals in *Butler vs. McGorrisk*, 114 Fed. 300; that the anomalous situation created by the decision of the courts below should be corrected; and that to such end, a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Seventh

Circuit and reverse it to the extent of the errors herein set forth.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 375

G. B. HOWELL, et al.,

Petitioners,

vs.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to bring before this Court the issues presented by the petition.

This is an action by the Shell Oil Company, Incorporated, and Chicago, Wilmington & Franklin Coal Company, Incorporated, as Plaintiffs, against John P. Minier, and others, as Defendants, to restrain the Defendants from drilling for or producing oil and gas from under the South One-Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-Six (36), Township Six (6) South, Range Two (2) East of the Third Principal Meridian, Franklin County,

Illinois. The Respondents, who were the Plaintiffs in the suit, assert that they, respectively, are the lessee and owner of the property rights in the coal, oil and gas underlying such property, together with the right to mine and remove the same, and the Defendants deny such right.

A controversy arises out of the construction of the warranty deed executed March 16, 1914, by the Defendants, John P. Minier and Rosa M. Minier, his wife, in favor of one Walter W. Williams, Plaintiff-Respondent, Chicago, Wilmington & Franklin Coal Company, by mesne conveyances, having acquired all of the interest of the grantee, Williams, thereunder and the Shell Oil Company, Incorporated, being the oil and gas lessee of such Coal Company.

On the said date the Miniers, being the owners of the fee simple title to the above property, conveyed to the said Williams all of the coal, oil and gas underlying such property together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by the mining out of the coal, oil and gas. The said deed provided for mining rights and for the use of part of this land in connection with mining on this particular land and other lands not conveyed by this deed. This deed provided in regard thereto as follows (R. P. 14):

> "Together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by the mining out of the coal, oil, or gas or from not leaving pillars or artificial supports under said lands and the further right to make and use underground passages or entries through said property to and from other mines and lands adjacent thereto and the right of removal

> of coal and other property therefrom, and with the right to the perpetual use of said passages and entries, for mining purposes and for such other purposes as the grantee, his heirs and assigns shall deem proper."

By such conveyance, Williams was granted in fee simple the coal, oil and gas, together with the right to mine and remove the same from this and adjoining land free and clear of liability for damages to the Miniers or other surface owners.

Continuing, then, the deed contained a special covenant that in addition to the estate so vested in the grantee he might purchase part of the surface in fee and take a deed therefor by paying therefor the sum of One Hundred Dollars per acre. This further option is set forth as follows (R. P. 87) (italics ours):

> "It is *also* covenanted and agreed that the grantee herein, his heirs and assigns, shall have the right *to take* and *use* so much of the surface of said land as *may be deemed necessary* for the purpose of erecting, maintaining and operating, hoisting, air, pumping, and escape shafts, drains, ditches and reservoirs, telephone and electric light, and power sites and the necessary roadways and railroad tracks to and from the same, with the right of way for any railroad necessary or required to carry said coal, *oil* and *gas* to market, but all the land the surface of which *is so taken* shall when occupied be paid for at the rate of one hundred ($100.00) dollars per acre."

It will be observed that such option permitted the grantee to locate the principal coal mine shaft and appurtenances on this land by paying for all surface taken for such purpose, One Hundred Dollars per acre.

Then it was provided that such option should remain in force for a period of two years from the time of the completion of the mine shaft intended to be used for mining

coal from under the land, the deed providing (R. P. 87-88) (italics ours):

> "It is understood that within two years after the mine shaft intended to be used for the purpose of removing the *coal* from under the premises herein is completed *all the surface privileges above set forth* that the grantee herein *desires to exercise* shall, either for mine switches or for *whatever* purpose, *be selected and paid for* and the grantor herein will execute a *deed* therefor, the surface privileges on the *remainder* of said land shall at the end of said two years be fully *released* and the right of the grantee herein *to take* any portion of the surface of the remainder of said lands is at an end."

The following additional requirement was made in regard to such surface which might be deeded to the grantee (R. P. 87-88) (italics ours):

> "It is understood that any surface *taken* by the grantee whether for switches or for any other purpose on or across the premises herein described shall be fenced with a lawful fence *within three months after a deed* to said surface is delivered and said fences shall at all times be kept in good repair by the grantee herein. It is also understood that in case any switches or mine tracks are constructed across said land by the grantee, his heirs or assigns, that at the request of the grantors herein, his heirs or assigns, a farm crossing shall be put in and maintained by the grantee."

It is the position of the Respondents that under such deed Williams was granted in fee simple the coal, oil and gas, with the right to mine and remove the same without liability to the surface owner for damages caused thereby, and that he was given the option of acquiring by deed a portion of the surface estate retained by the grantor to be used in mining coal by paying therefor the sum of One Hundred Dollars per acre within two years from the date of the completion of the mine shaft to be used for mining

coal from under the land. It, of course, follows, if this be the meaning of the instrument, that the loss of the option would have no effect upon the fee simple grant of the oil and gas together with the right to mine and remove the same without liability for damages for surface subsidence or otherwise.

It is the Petitioners' position, as we understand it, that the provisions relating to the forfeiture of the option of acquiring the portions of the surface are so broad as to work a forfeiture not only of the optional privileges to purchase in fee simple a part of the surface of the premises but also the grant, itself, insofar as it conveyed the oil and gas. Of course the only provision for a cessation of any right or privilege is the provision (italics ours) (R. P. 87):

> "the *surface* privileges on the remainder of said land shall at the end of said two years be fully released and the right of the grantee to *take* any portion of the *surface* of the remainder of said land is at an end."

It will be observed that there is no provision for a forfeiture or release of anything but "surface privileges." There is no attempt to terminate the grant of the oil and gas.

The District Court in its opinion, and the Circuit Court of Appeals in No. 7811, which was the appeal of Respondents, held that all rights of the Respondents to use the surface for oil and gas production had terminated but the District Court also held and the Circuit Court of Appeals, in No. 7812, which was the appeal of Petitioners, held that the property rights of the Respondents in the oil and gas had not been terminated.

In the petition for certiorari Petitioners state that they are requesting review of the judgment in No. 7811 only insofar as it may be affected by the question presented

here. Of course, they cannot properly ask for any review in No. 7811, which has been determined in their favor and in which Respondents have not asked for review. The decision of the Circuit Court of Appeals in No. 7811 is final and any discussion as to whether it is right or wrong would be out of place here. The decision in No. 7811 is, however, immaterial here as the law has been correctly announced in the Circuit Court of Appeals and District Court that the property rights of the Respondents have not been terminated in the oil and gas, irrespective of what their rights to use the surface may be.

It will be noted that the landowners, Miniers, under whom the Petitioners in the petition for certiorari are claiming as oil and gas lessees, have not petitioned for certiorari in this case and that as far as these landowners, the surface owners, are concerned the judgment of the Circuit Court of Appeals of the Seventh Circuit is now final.

SUMMARY OF ARGUMENT.

No grounds exist which would justify the exercise by this Court of its power to grant a writ of certiorari.

(I)

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) is to be exercised only when there are special and important reasons therefor.

The petition presents no questions of gravity or importance because of the legal, economic or social problems involved, and this litigation is not of such importance to justify this Court's issuance of its writ of certiorari.

(II)

The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The United States Circuit Court of Appeals for the Seventh Circuit followed the established judicial precedents in the State of Illinois in analyzing the issues and in reaching its decision in this case. The decision in this case is in entire accord with the Illinois law of real property. Both the District Court and the Circuit Court of

Appeals, both of which courts sit in the State of Illinois, considered the Illinois authorities and correctly based their decision in this case that the property rights of the Respondents in the oil and gas still exist, upon the Illinois precedents.

(III)

The decision of the Circuit Court of Appeals is not in conflict with the decision of Eighth Circuit Court of Appeals in the case of Butler v. McGorrisk, 114 Fed. 300.

ARGUMENT.

(I)

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under the well-established principles the power of this Court to grant writs of certiorari under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) rests in the discretion of the Court. It has been many times declared that this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

That this case which was submitted to and decided by the Circuit Court of Appeals is not of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari is apparent from the petition. This is just a private suit over title to property.

No important legal, economic or social problem is involved, and it is a question to be decided upon the ordinary principles of law, and is not a cause of special importance or gravity beyond the importance to the litigants themselves.

(II)

The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The warranty deed (Respondents' Exhibit 1, R. P. 86-88) conveys and warrants "all the coal, oil and gas" underlying the eighty acres here involved. The only limita-

tion of any character appearing therein is the provision terminating certain particularly described "surface privileges" two years after the completion of the coal shaft therein referred to. Petitioners do not and can not point to any provision of the deed indicating that the parties intended to terminate or forfeit the grantee's estate in the minerals so conveyed. The statutory form warranty deed which conveys and warrants "all" of the coal, oil and gas underlying the eighty acres here involved negatives such thought. Neither does the deed contain any provision forfeiting or terminating the grantee's right to mine and remove all of such minerals which were so conveyed. The two-year surface privilege provision does not purport to terminate such right. Such provision is wholly foreign to the estate in the minerals themselves which is conveyed by the deed. The scope of this mere surface impediment cannot by any construction be extended to the subsurface minerals and rights therein which are the subject of the grant itself.

Petitioners contend that a covenant should be implied to terminate and forfeit the oil and gas rights conveyed by this deed. Under the Illinois law a forfeiture can not be based upon an implied covenant. *Conductors' Benefit Association* v. *Tucker*, 157 Ill. 194, 200; *Sears Roebuck & Co.* v. *Higbee*, 225 Ill. App. 197, 201; *McClenathan* v. *Davis*, 243 Ill. 87. Petitioners concede that Respondents still own the coal in and under said premises, said coal having been conveyed by the same language and in the same granting clause as the oil and gas.

Petitioners' position and argument is entirely unsound. It completely overlooks the fact that a landowner has well-recognized property rights in underlying oil and gas wholly apart from the incidental uses to which the surface may be put in mining such minerals, and further

overlooks the fact that oil and gas may be taken from beneath a tract of land without entering upon the surface, either by draining such products from wells drilled on the margin of adjoining land or by directional or slant drilling.

Of what value are Respondents' property rights in the oil and gas without surface privileges? Some of the rights or incidents of ownership of the oil and gas estate in Illinois without the use of the surface for the production of the oil and gas may be enumerated as follows:

(a) The right to install equipment *under* the surface to mine and remove the oil and gas.

(b) The right to prevent others from operating *under* the surface for the oil and gas.

(c) The right to keep others from operating *upon* the surface to remove the oil and gas under the land.

(d) To own all oil when found by any operations to produce oil from said land or *upon* or *under* the surface of the land.

(e) To use such oil when found through any such operations *upon* or *under* the surface of the land.

(f) To produce oil from said land by drainage, by drilling on adjoining tracts, or by directional drilling from adjoining tracts of land.

(g) To market such oil and receive the benefits therefrom. These are a few of the rights of ownership that the owner of property rights in the oil and gas would have irrespective of his right to use the surface to produce the same.

Respondent, Chicago, Wilmington & Franklin Coal Company, claims to hold freehold property rights in the oil and gas underlying some 3,200 acres of land in the imme-

diate vicinity of the eighty-acre tract here involved. On September 6, 1940, it executed an oil and gas lease covering such tract and including the present tract and therein leased unto the lessee the exclusive right to produce all of the oil, gas, casinghead gas and casinghead gasoline underlying all of the section of land in which the present tract is located, other than the Southwest Quarter (SW¼) of such section. Such lease was offered in evidence as Plaintiffs' Exhibit III, and appears at p. 93 of the Record. Such lease covers the major portion of the oil and gas pool of which the eighty acres is a part. Thus, whether wells be drilled upon the surface of this tract or upon the surface of adjoining tracts, the bulk of the recoverable oil lying beneath the land here involved will be recovered by the Chicago, Wilmington & Franklin Coal Company and their lessees. Thus, it is erroneous to assume that the denial to Respondents of the right to use the surface of the eighty acres, in which Petitioners claim an interest, in drilling for oil and gas is to deny them any enjoyment of the property conveyed under the deed, for, as we have seen, the right to use the surface is not essential to the enjoyment of such property.

Petitioners' argument resolves itself down to the arbitrary position that without any rhyme or reason surface rights are the important elements of a grant of oil and gas, and that without such surface rights no property interest of any kind or character may be owned by a grantee. It is asserted that such is the law in the State of Illinois. It is claimed that such was the holding of that Court in *Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9, 84 N. E. 53; *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818; *Poe* v. *Ulrey,* 233 Ill. 56, 84 N. E. 46; *Triger* v. *Carter Oil Co.,* 372 Ill. 182, 23 N. E. (2d) 55.

Typical of the language appearing in such decisions and

upon which Petitioners so strongly rely is the statement found in *Triger* v. *Carter Oil Company*, 372 Ill. 182, 185, 23 N. E. (2d) 55, 56, as follows:

> "It is the settled law in this state that oil and gas in place are minerals but by reason of their fugacious qualities they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land. No title to it vests in the grantee until it is actually removed from the land."

It will be noted that the Court in no way states that surface rights are indispensable to a grant of oil and gas nor is it stated that the only right possessed by a landowner with respect to underlying oil and gas is the right to use the surface of the land in drilling for and producing such substances. It is stated that oil and gas in place by reason of their fugacious qualities are incapable of an ownership distinct from the soil itself. This, however, is not and should not be understood to be a statement that the only right of the landowner is the right to use the surface of the land in operating in connection with such minerals. It is, rather, the statement that such rights as the landowner has in such minerals arises out of his ownership of the soil, that such ownership vests in him the exclusive right to everything lying beneath the land, but that by reason of the fugacious quality of the minerals involved, such landowner does not have title to any particular quantity of same. A landowner, by virtue of his ownership of the soil, has the right to take such oil and gas as may be produced from beneath his land and upon such production he acquires an absolute title to such substances so produced. Likewise, he has the right at all times that others shall not take such substances by operations

either upon or below the surface of his land, and the right to take such oil and gas as may be produced from a well bottomed beneath his land is a property right which may be transferred to another. The right to use the surface, however, is but one of the incidental rights which accompany the landowner's estate in the oil and gas and is not of itself the essence of the estate. The estate normally may be more conveniently enjoyed by wells drilled upon the surface of the land. However, the mere fact that the wells may be drilled upon adjoining lands and bottomed beneath his land in no way affects his exclusive property right in and to the substances produced thereby from beneath the land and he could enjoin such drilling and require an accounting for any oil so produced.

The several recent California slant drilling decisions exemplify this principle. See *People* v. *Brunwin,* 2 Cal. App. (2d) 287, 37 P. (2d) 1072; *Union Oil Co.* v. *Reconstruction Oil Co.,* 20 Cal. App. (2d) 170, 66 P. (2d) 1215; *A. E. Bell Corporation* v. *Bell View Oil Syndicate,* 24 Cal. App. (2d) 587, 76 P. (2d) 167; *Pacific Western Oil Co.* v. *Bern Oil Co.,* 13 Cal. (2d) 60, 87 P. (2d) 1045.

It is not necessary that any surface rights be granted in order to constitute a valid conveyance or exclusive right to either produce or receive the oil and gas.

Respondents say that the property or ownership of the oil and gas estate in Illinois land is simply an aggregate of incidents, privileges and benefits pertaining to the oil and gas or dominion over it. Only in its strictest sense is "property" defined to mean a physical thing. In its ordinary sense ownership of property has a broader meaning. It means a physical thing or right or privilege plus the rights of dominion, possession, power and disposition which may be acquired over it to the exclusion of other

persons. In Illinois, the right to mine and remove oil and gas is this aggregate of rights, privileges and benefits and is a corporeal interest in the land itself. *Transcontinental Oil Company* v. *Emmerson* (1921), 298 Ill. 394, 131 N. E. 645.

In *Rigney* v. *City of Chicago*, 102 Ill. 64, it is said (italics ours):

> "Property in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, *and generally to the exclusion of all others*, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or subject of the property rather than the property itself."

The Supreme Court of Illinois has repeatedly recognized that a landowner may create a separate estate in the surface and a separate estate in the oil and gas. As the Court said in *Updike* v. *Smith*, 378 Ill. 600-605:

> "A landowner may create a separate estate either by a deed such as was considered by this court in the *Triger case, supra*, or by a grant of the land to a third person with an express reservation of the oil and gas. (29 A. L. R. 586.) A testator may devise separate tracts covered by one lease, excepting the oil thereunder, and devise his rights in the oil to all the named devisees as tenants in common *Conover* v. *Parker*, 305 Ill. 292."

It is Respondents' basic position that under the law of Illinois a landowner's property right in underlying oil and gas may be severed from his right in the surface of the land; that such is the case is demonstrated by the fact that such right of severance has always been recognized by the Illinois Court.

In *Renfro* v. *Hanon,* 297 Ill. 353, 130 N. E. 740, at p. 741, the Court, in holding that possession of the surface estate was not possession of the mineral estate, severed by a grant of "all the coal, lead, oil, silver, gold, rock, fluids, ores, metals, and all other minerals" said:

> "Regardless, however, of any question of payment of taxes, it was necessary to prove possession of the minerals, and there could be none in law after the severance. The title to the minerals was severed by the deed from Richard Palmer and wife to R. N. Barbour, and where that is the case the possession of the surface does not carry with it the possession of minerals in place under the surface. By a severance separate estates are created, which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other; and this is so even if the instrument constituting color of title purports to convey the whole property, as the will of Palmer did. * * *
>
> "* * * Disregarding that fact, however, title could not be acquired under the Limitations Act without possession, and there could be no possession after the severance of the estates. The complainants did not prove title under the Statute of Limitations."

This same rule is announced in the case of *Kinder* v. *La Salle County Coal Co.,* 301 Ill. 362, 364, 367, 133 N. E. 772, where it is said (italics ours):

> "By a deed dated March 25, 1867, he *severed the underlying mineral estate in the land from the surface estate in the land,* and conveyed by warranty deed to the Chicago Coal Company, a corporation, 'all the bituminous or stone coal, together with the right to mine the same,' and by the same instrument quit-claimed 'all the right in or title to the oil and minerals, of every description, underlying the above and foregoing described lots, tracts and parcels of land.' * * *
>
> "Title to the minerals *distinct* from title to surface of land, may be proven in exactly the same way

as title to the *surface.* (*Catlin Coal Co.* v. *Lloyd,* 176 Ill. 275.) Title to the mineral stratum may therefore be shown by proof of adverse possession, but the difficulty with respect to getting title of such an estate by adverse possession is found in the difficulty of getting and proving actual possession. By a severance separate estates are created which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other."

Also see the case of *Uphoff* v. *Trustees of Tufts College,* 351 Ill. 146, at page 154 (184 N. E. 213), where it is said (italics ours):

"It is our opinion that the title to the coal and minerals was severed by the deeds from Forbes and Magee to Sutliff, Chapman and Richards in 1869 and 1870, respectively. *Where such severance has occurred the possession of the surface does not carry with it the possession of the minerals under the surface. Separate estates are created* by a severance, which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other; and this is so even if the instrument constituting color of title purports to convey the whole property. (*Renfro* v. *Hanon,* 297 Ill. 353; *Catlin Coal Co.* v. *Lloyd,* 180 id. 398; *Kinder* v. *LaSalle County Coal Co.,* 301 id. 362, and cases cited.)"

The same rule is recognized in the case of *People* v. *Bell,* 237 Ill. 332, 86 N. E. 593, where the Court held that a mining right to dig for coal and other minerals included oil and created an estate which could be taxed separate and apart from the surface.

The statement by the Illinois Courts that oil and gas are incapable of ownership distinct from the soil, that no title to the oil vests in the grantee until it is actually removed from the land, but that oil and gas belong to the

owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land, in no way changes this rule. Since no one knows for certain whether or not there is any oil under a piece of land and since oil is fugacious in nature, the Illinois Courts regard a grant of oil and gas only as a transfer of the right of the owner to take whatever oil and gas may be under the land whenever he shall see fit to produce them. That, however, in no way means that there must be a grant of a surface right along with the mineral rights, in order to constitute a conveyance of the exclusive rights to the oil and gas. It must be conceded that the grantee in a mineral deed which conveys oil and gas has a right to sink wells on the margin of adjacent lands as effectively as natural conditions will permit, or to employ the improved method of slant drilling by projecting its wells and drawing oil and gas from greater distances.

In the recent case of *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, the Supreme Court of Illinois held that although a railroad company had an exclusive easement to a railroad right of way, still the title to the oil and gas did not pass but remained in the grantor of the right of way and his assignees. There the persons owning the oil and gas had no surface privileges in the railroad right of way.

In the case of *Triger* v. *The Carter Oil Co.*, 372 Ill. 182, 23 N. E. (2d) 55, heretofore cited by us, the guardian ad litem contended that the deed did not convey any oil and gas. The Carter Oil Company contended that the mineral deed was an absolute conveyance of the minerals, the title vesting in the oil and gas being deferred until they were reduced to actual possession, when

the property becomes absolute, and relied on the case of *Cuff* v. *Koslosky,* 165 Okla. 135, 25 Pac. (2d) 290, hereinafter cited by us, and also the case of *Callahan* v. *Martin,* 3 Cal. (2d) 110, 43 Pac. (2d) 788, pointing out that both Oklahoma and California are nonownership States insofar as ownership of the oil and gas are concerned. The Supreme Court of Illinois did not cite these two cases in the opinion, but apparently followed their theory, because it was held that the mineral deed did convey the right to the oil and gas. It is true that in that case the mineral deed also granted the right to the grantee to enter upon the land for the purpose of prospecting and operating wells, which the Court mentioned, but the decision was not placed upon the theory that it was necessary that such a surface right be granted before the deed could be operative.

The Court in that case (*Triger* v. *The Carter Oil Co.,* 372 Ill. 182, 23 N. E. (2d) 55, at p. 56) held that the heirs of a grantor who had conveyed all her interest in the oil and gas prior to her death while inheriting the surface, inherited no interest in the underlying oil and gas. The Court said (italics ours):

> "* * * At the time of the execution of the deed Mary C. Horn only owned the oil and gas in an undivided one-third of the whole and this was subject to the leasehold interest of the Carter Oil Company. *Cross-appellants did not inherit any interest in the oil and gas. Their inheritance was in the land, devoid of any interest in the oil and gas.*"

The same rule as announced in the case of *Tallman* v. *E. I. & P. R. R. Co.,* 379 Ill. 441, was recognized by the Supreme Court of Illinois in another recent case, being the case of *The Texas Company* v. *O'Meara,* 377 Ill. 144, 36 N. E. (2d) 256, wherein it was held that even though a

drainage district had a deed for a right of way one hundred feet wide over the surface of certain premises, nevertheless, the ownership of the oil and gas did not pass with the surface so conveyed to the drainage district but remained in the grantor. If Petitioners' theory was correct, the grantor could not have retained any ownership or rights in the oil or gas under this right of way because he did not own the surface.

Under the so-called "non-ownership doctrine" followed by Illinois, and also by certain other oil producing states, such as Oklahoma, California, Kentucky and Indiana, a landowner is said to have no title to any specific quantity of underlying oil unless and until he actually reduces same to possession. Such conclusion is arrived at by reason of the fugacious quality of such products and the fact that they may be drained from beneath the land by adjoining owners. The doctrine extends no further, and in all such states it is recognized that a landowner has property rights in such substances even before they are produced. Such rights include the exclusive right to take such substances as may be produced by wells bottomed beneath the land.

In Summers on Oil and Gas, Vol. 1 (Perm. Ed.), page 350, it is pointed out (italics ours):

> "It is believed that much of the confusion and apparent contradiction relative to the nature of the legal interest created by grant or exception of oil and gas is due to the misuse of such terms as 'property', 'title', and 'ownership'. The nature of the landowner's interest in oil and gas, and of the interest which he may create in others, is necessarily determined by what the courts have held that he may and may not do, and what others may and may not do as against each other, in respect to the oil and gas under his land. In deferring to the interest, some of the courts have said that the landowner or his

> grantee has a title in the oil and gas; others have said that he has a privilege to take them and that such privilege is exclusive, meaning thereby that he has a right that others shall not take by operations on his land; and still others have said that he owns the oil and gas. It is believed that in most of these instances the courts meant about the same thing; that is, that the landowner, although his legal relations in respect to oil and gas are not such that he may be said to own the oil and gas that is actually under his land, *nevertheless has privileges of taking them and rights that others shall not take them, and that these relations create in him a property interest; that this property interest can be transferred to another in fee or for life.*"

It should be observed that the property interest referred to is an interest in the oil and gas itself and not merely in the surface of the land.

The following quotations from decisions of the courts of last resort of oil producing states adhering to the same theory of ownership followed by Illinois uniformly recognize that a landowner has a property right in underlying oil and gas wholly apart from the incidental right of using the surface in production operations, such property right being a vested interest in such products themselves.

In *Cuff* v. *Koslosky*, 165 Okla. 135, 25 P. (2d) 290, at pages 292-293, the Supreme Court of Oklahoma, after pointing out that "a landowner does not own absolute title in the gas and oil that may permeate below the surface," said (italics ours):

> "However, an owner of land may convey, except, or reserve his right to the oil and gas beneath it. This private property right is the proper subject of a sale. * * *
>
> "The title to the oil and gas in place by such conveyance, grant, or exception does not vest, and no ownership of the minerals in place is acquired until the grantee finds and captures the same, although

> this valuable right as outlined, to-wit, to obtain and reduce the oil and gas to possession, *creates some kind of a property interest,* or an incorporeal right in the land. Nevertheless, this character of interest is property. * * * *It is an absolute right to the oil and gas, a quantum of the corpus of the land, but under our decisions no title to the oil and gas obtains until the same have been captured. In reality it is an absolute conveyance of these minerals in place with title vesting in the oil and gas deferred until they are reduced to actual possession, when property in them then becomes absolute. It amounts to the creation of a separate estate.* * *
>
> *"The grant under the mineral deed vests a permanent present interest in the mineral estate;* * * *."*

The California court, in *Dabney-Johnston Oil Corporation* v. *Walden*, 4 Cal. (2d) 637, 52 P. (2d) 237, 243 said (italics ours):

> "The owner of land has the exclusive right on his land to drill for and produce oil. This right inhering in the owner by virtue of his title to the land is a valuable right which he may transfer. The right when granted is a profit *a prendre, a right to remove a part of the substance of the land.* * * *Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title."*

In the case of *Gray-Mellon Oil Co.* v. *Fairchild*, 219 Ky. 143, 292 S. W. 743, 745, it was stated:

> "Oil and gas in the earth stand much as water percolating under the earth. The owner in fee owns to the center of the earth. But he does not own a specific cubic foot of water, oil, or gas under the earth until he reduces it to possession. The reason is, these substances are fugitive, and the water, oil, or gas which is under his land today may be elsewhere tomorrow. He is only entitled to hold as his own the water, oil, or gas which he finds under his

land and reduces to possession. But the right to explore for these substances and to reduce them to possession, if found, is a valuable part of his property. It is an interest in the land springing out of his ownership of everything above and below the surface. While the oil is fugitive, the sand bearing oil is as stationary as a bank of coal. The only practical use to which the oil-bearing sand can be put to is to get the oil out of it. The exclusive, permanent right to get the oil from the sand is necessarily a right to a part of the land, for to use the sand in any other way would be to destroy the right to extract the oil from it, as the sand must be allowed to remain as it is for the oil to flow through it."

It is thus seen that a landowner has certain definite rights in and to the oil and gas underlying his land. Such rights are termed "property." It matters but little whether the landowner is said to have title to the oil and gas lying beneath his land or to merely have the exclusive right to take such substances therefrom. In any event he has a certain and definite property right therein. The courts of every jurisdiction in the country recognize the right of a landowner to transfer this property interest to another and thereby sever the estate in the minerals from the estate in the surface. When such a grant is executed, it operates to vest in the grantee every right which the landowner previously had in such substances and thereafter such grantor has no right, title, interest or estate in and to such minerals. Having no right thereto, certainly it could not be thought that he should be privileged by operations conducted on the surface to take from beneath the land the minerals which he had conveyed to another. The mere fact that such minerals might be more accessible to him than to his grantee does not in any way alter or change the situation. By solemn conveyances John P. Minier and Rosa M. Minier, his wife,

Petitioners' grantors, conveyed away all of their right, title and interest in and to all of the underlying oil and gas. Having done so, they and their grantees are not now in position to take such minerals or claim title to any of same which may be produced from these premises. Such was the holding of the Trial Court and Circuit Court of Appeals and it is, of course, correct.

It matters not whether the landowner is viewed as having absolute title to underlying oil and gas or only as a qualified ownership thereof. Whatever be the nature of his interest it is held in all of the states, including Illinois, that his interest therein may be severed from his interest in the surface estate and transferred to another. Thus, upon the execution and delivery of the present deed all of the interests of the grantors in the underlying oil and gas were conveyed unto the grantee, and this irrespective of the exact nature of their interest therein. The conveyance here of "all the coal, oil and gas" vested in grantee all of grantors' interest therein. It is therefore absurd to suppose that a mere impediment to or loss of a surface user, could affect the grantee's property right in such products.

Cases involving analogous situations and holding that exclusive possession of the surface by another, so that the owner of the oil and gas may not enter upon the surface, has no effect upon the property rights of the owner of the oil and gas are *Hamilton* v. *Foster,* 272 Pa. 95; 116 Atl. 50, and *Consumers' Gas Co.* v. *American Plate Glass Co.,* 162 Ind. 393; 68 N. E. 1020.

Petitioners' position is not supported by any decision of any court. It violates every known and recognized principle with respect to a landowner's right in underlying oil and gas. It wholly misconstrues the doctrine of ownership adopted by the Supreme Court of Illinois. Un-

der no theory advanced would Petitioners or any of them be entitled to the oil and gas underlying the land and therefore Respondents were entitled to the injunction granted unto them by the lower court.

Counsel also argue since there was no directional drilling until 1930 that it could not be claimed that this deed passed the oil and gas if it had to be obtained by directional drilling. We wish to point out in this connection that this is not a matter of determining the intention of the parties with reference to whether oil and gas were intended to be conveyed. The deed expressly conveys the oil and gas, and it was just as possible to obtain the oil and gas by directional drilling in 1914 when the deed was made, as it was in 1930. The fact that directional drilling was not discovered until 1930 did not permit a different meaning being given the language of the deed which expressly conveyed the oil and gas. This was not a matter of construction. We do not see how this argument militates against Respondents' rights or contentions in the present case.

The conveyance of the oil and gas vested in Respondents a property right which prohibited the Petitioners from taking or attempting to take the oil and gas from this property. The Illinois Court, as above set forth, has stated that it will protect this property right by injunction. Whether or not the Respondents could have recovered all or part of the oil under this premises is entirely immaterial insofar as the Respondents' right to an injunction is concerned. Under the Illinois cases cited in Petitioners' briefs the rule is specifically announced that the title to the oil and gas when recovered vests in the mineral grantee. Therefore, whether the oil is recovered by Respondents or Petitioners during the course of this litigation, nevertheless, upon its recovery, the title to the

same vests in Respondents. Petitioners stipulated (R. P. 56-62) that the premises should be drilled pending this litigation by the respective parties, and the oil produced therefrom during the pendency of this suit without prejudice to the rights of either party. Most certainly Petitioners cannot now argue with any logic that Respondents do not own the oil and gas produced because Petitioners have produced part of this oil under the stipulation or because Respondents have not proved how much oil they could have produced by directional drilling or drainage.

(III)

The decision of the Circuit Court of Appeals is not in conflict with the decision of Eighth Circuit Court of Appeals in the case of Butler v. McGorrisk, 114 Fed. 300.

The Petitioners, in their brief, cite the case of *Butler* v. *McGorrisk,* 114 Fed. 300. That case involved property in the State of Iowa, and not in the State of Illinois, and involved local law of the State of Iowa and not of the State of Illinois. Furthermore, it is not inconsistent with the ruling of the Circuit Court of Appeals in the present case, for the reason that in that case was involved the construction of a grant and the Court held that the language of that grant simply conveyed all of the coal which grantee should mine and remove within the time limited. The present case does not involve a similar grant because here all of the oil and gas and coal is granted without limitations. There is no contention by the Petitioners that the rights of the Respondents to the coal have ended. Most certainly, there is no reason for their contention that the Respondents' right to the oil and gas has ended.

Petitioners also cite certain authorities in other jurisdictions with reference to the construction of deeds of standing timber, in which they say that it is held that the time limit on the right of removal of timber must be construed as limiting the title to the timber. The Appellate Court of the State of Illinois has held to the contrary in the case of *Walker* v. *Johnson,* 116 Ill. App. 145, at pages 145-148, where the Court said:

> "Where one owning standing and growing timber, with the right to cut and remove the same within a specified period, sells to another a certain portion of such timber, with the right, likewise, to cut and remove the same within a period specified, the purchaser acquires more than a mere license, but, upon the other hand, becomes the owner of such growing timber, coupled with a right to cut and remove the same, the time limit in question being regarded as a covenant and not as a condition upon which to base a forfeiture. * * *
>
> "I have this day sold to George W. Walker the timber standing and growing on W. ½ N. E. ¼; and E. ½ N. W. ¼; and S. W. ¼ N. W. ¼; and S. W. ¼; N. W. ¼ S. E. ¼; 32, 6 l-e. in Fayette County, Illinois. Said timber is to be taken off within five years from this date. * * *
>
> "Under the contract with Abbott, the defendant became the owner of the growing timber, coupled with the right to cut and remove it. This was more than a mere license; it was a substantial part of the thing sold, paid for, and delivered so far as it was capable of delivery. *Con. Coal Co.* v. *Peers, et al.,* 150 Ill. 344. *The time limit for removal of the timber is to be treated as a covenant, and not a condition, upon which to base a forfeiture.*"

The timber cases cited by Petitioners have no application to the present case and, as heretofore pointed out, under the settled Illinois authorities, the grant of the oil and gas created a property right in real estate which was, as pointed out in the case of *Transcontinental Oil Co.* v. *Emmerson,* 298 Ill. 394, a corporeal hereditament.

Clearly the rulings of the two Federal Courts in the State of Illinois determining the Illinois law as to the property rights in the oil and gas in question in this litigation were correct and followed exactly the Illinois precedents and authorities applicable to the present situation.

CONCLUSION.

The Circuit Court of Appeals affirmed the District Court in holding that the property rights in the oil and gas in this case were vested in the Respondents and in so doing followed the established judicial precedents.

It is, therefore, respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant the writ of certiorari.

Respectfully submitted,

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